Case No.: 48367-0-II

(Consolidated with No. 48697-1-II)

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

DAVID K. BOWERS and KATHERYN E. BOWERS, a married couple; ROBERT COBB and DEBRA E. COBB, a married couple; and ANTHONY L. BELTRAME and MAGGIE BELTRAME, a married couple,

Respondents,

v.

JAMES W. DUNN, dealing in his separate property, and JANE DOE DUNN,

Appellants

AENDED BRIEF OF RESPONDENTS

William F. Wright, WSBA # 31063

Of Attorneys for Respondents

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I. RESTATEMENT OF ISSUES ON APPEAL

A. Did the trial court lack legal authority to enter the Order Regarding Parties Rights and Responsibilities in Maintenance of Road dated December 9, 2015 as amended on Reconsideration? No.

B. To the extent that it is inconsistent with the court's intent regarding parcels involved and parties to the lawsuit, should the court's order be revised to clarify specific findings of fact? Yes.

II. STATEMENT OF THE CASE[1]

This appeal arises from the Superior Court's December 9, 2015 Order declaring rights and responsibilities arising under a shared easement. CP at 114[2]-118, as subsequently revised on Reconsideration dated February 8, 2016. CP at 154. The easement itself and the rights of the parties to it were decided at a previous bench trial on March 19, 2014. CP at 27-47. Subsequently, Appellant Dunn's actions to obstruct and interfere with the easement required a series of equitable and injunctive orders restricting Mr. Dunn from his abusive contact with the owners of the dominant estate in the easement. See CP at 66-88, 97-110.

In considering and crafting the order, the court below was attempting to articulate the rights of the parties under an access easement. CP at 113. As a basis for the order, the court noted "that the obligations I

[1] The facts of the case are set out more fully in briefing in the companion case. For brevity Respondents will refer to the specific facts called into question by Appellant Dunn.

[2] References to the Clerk's Papers use the page numbers assigned in the March 23, 2016 Clerk's Papers index.

have imposed are consistent with those imposed by case law and are also within the Court's equitable authority." CP at 113.

Appellant Dunn specifically questions the following findings of fact set forth in the order and retained on reconsideration:

> 1.1 Each parcel referenced in Exhibit A hereto and incorporated by this reference and parcel number 0520177110, use the roadway described for ingress and egress and parcels both benefit from and are burdened by the easement.
>
> ...
>
> 1.7 In 1984, lots 3 and 4 of Short Plat 77-606 were divided to create 4 lots pursuant to Pierce County Short Plat Nos. 840613039 and 8406010455. The existing thirty (30) foot easement for ingress, egress and utilities is identified on each plat.

CP at 115.

In addition, Appellant Dunn questions the applicability of the order to properties benefitted and burdened by the easement but whose owners are not parties to the lawsuit. Finally Appellant Dunn argues that the court exceeded its equitable and common law authority in creating an order that imposes specific obligations on the parties.

For the following reasons, Respondents request that this Court find that the court below properly entered the order in question. To the degree that the order is not supported by the facts or exceeds the courts authority, Respondents request that this Court **remand** with instructions to cure any defects rather than vacate the order entirely.

III. ARGUMENT

A. The findings of fact may be revised.

As an initial matter, Appellant Dunn is correct that the findings of fact 1.1 and 1.7 as set forth in the order may be confusing in light of the evidence provided. To the degree that confusion impedes the effectiveness of the relief, Respondents' recommend that the order be remanded for clarification, and recommend the following edits shown in bold:

> 1.1 Each parcel referenced in Exhibit A hereto and incorporated by this reference **except** parcel number 0520177110, use the roadway described for ingress and egress and parcels both benefit from and are burdened by the easement.

Alternatively, Respondents propose editing Exhibit A removing the description of parcel number 0520177110 and removing "and parcel number 0520177110," from finding 1.1 of the order.

> 1.7 In 1984, lots 3 and 4 of Short Plat 77-606 were divided to create **five (5)** lots pursuant to Pierce County Short Plat Nos. 840613039 and 8406010455. The existing thirty (30) foot easement for ingress, egress and utilities is identified on each plat.

To the degree that the current findings are confusing or not supported, Respondents ask that clarification be ordered on remand as suggested. *See e.g. Buck Mountain Owners' Assn. v. Prestwich*, 174 Wn. App. 702 at 732 (Div. 1, 2013) remanding with instructions to modify the order.

B. The Order may be clarified regarding the parties involved.

Likewise, the court below was clear that it was *not* assuming jurisdiction over non-parties in this case, but was intending to clarify the rights and obligations of the parties to this suit. 111-112, 113. The order neither binds non-parties nor "re-writes the short plat," but sets forth those rights and obligations that are common to affirmative easements whether or not there is a maintenance agreement. CP 114-118.

To the degree that this Court is inclined to read ambiguity regarding the affected parties, the Court may remand with instructions to clarify that the order applies only to the parties to the lawsuit. To that end, the following changes might clarify the order:

> 2.1 It is hereby ordered that **all parties to this lawsuit, as required by the easement and in addition to any obligations held by non-party property owners of easement rights herein,** ...
>
> ... Maintenance for the road due to weather and normal wear and tear may be initiated when **a majority** of the property owners agree to do so...
>
> 2.3 ... Each parcel shall be responsible to contribute a **one fourth** share of maintenance expenses...
>
> 2.6 Any street signs constructed on the easement must be approved by **a majority** of the affected property owners...

As noted above, to the degree that imperfections obscure the intent of the court or otherwise extend beyond its authority, the proper remedy is

to remand with instructions to modify. *Buck Mountain*, 174 Wn. App. 702 at 732.

C. The order on appeal is grounded in case law and in equity.

Appellant Dunn asserts that the court below exceeded its authority in issuing the order at all. As fully briefed and argued in the companion appeal, the Superior Courts have broad authority in equity to declare the rights and responsibilities of parties[3]. Furthermore, as set forth in *Buck Mountain*, 174 Wn. App. 702 and in *Bushy v. Weldon*, 30 Wn.2d 266 (1948), the Superior Courts may determine the rights and obligations of parties to an easement, and in doing so may apply "a proper rule of simple justice" to make fairly specific determinations. *Bushy*, 30 Wn.2d at 272.

In this case, the court below declared the rights of the parties to the suit, then ordered affirmative injunctive relief between the parties directing them to specifically perform their obligations under the easement. CP at 114-118. The court specifically stated that it lacked authority to order the parties to sign a proposed Road Maintenance Agreement. CP at 111. However, it is well within the Superior Courts' equitable and common law authority to affirmatively injoin parties to specific affirmative and negative acts.

[3] See e.g. *Kucera v. State of Washington*, 140 Wn.2d 200 at 209-210, 995 P.2d 63 (2000); *Washington Fed'n of State Employees v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983).

In this case, the court weighed the interests of the parties to the lawsuit, the equities and relative behaviors of the parties and the rights and obligations under the easement. CP at 111-113, RP (10/16/15) at p. 7-10, RP (1/29/16) at 7-11, 20-25. The court's order is an attempt to balance those interests of the parties to the lawsuit with the rights and responsibilities inherent in the use of the easement. To the degree that the court overstepped or was unclear, the order should be remanded with instructions to clarify not vacated as requested by Appellant Dunn. *Buck Mountain,* 174 Wn. App. 702 at 732.

In fashioning affirmative injunctive relief, the court applied "a proper rule of simple justice," weighing the equities and the interests of the parties. *Bushy*, 30 Wn.2d at 272. In *Bushy*, the Supreme Court acknowledged upheld the lower court's directive that the costs of maintenance be shared. *Id.* at 271.

The Supreme Court also upheld the following affirmative relief:

> The decree...also requires that the parties park their cars at a distance not less than 10 feet to the east of the archway which covers the driveway as it separates to lead to both garages. The direction concerning parking of the cars was brought about by appellant's action in parking his car on the driveway in such a manner as to exclude respondent's use of the driveway and of her garage.

Id. at 272. As in *Bushy*, Appellant Dunn has repeatedly and provocatively interfered with the Respondents' rights to use the easement as intended.

CP at 67-88, RP (10/16015) at 7-8. The court below was well within its discretion under *Bushy* to order affirmative injunctive relief such as a speed limit, signage and other limitations affecting all parties.

D. The Order is not a maintenance "Agreement."

Appellant Dunn argues that since the Order bears resemblance in some respects to the agreement proposed by the Respondents, the Order *is* an agreement that the court is forcing them to be party to. The court makes abundantly clear that it lacks the power to force parties to come to an agreement and therefore is using its equitable and common law legal authority to declare rights and responsibilities of the parties. Respondents agree, as did the court below, with Appellant Dunn's argument that there is no legal authority allowing the court to impose a road maintenance "agreement" as a contractual obligation.

However, the order imposes no such agreement. CP at 114-118. As noted by Judge Nevin, "the obligations I have imposed are consistent with those imposed by case law and are within the Court's equitable authority." CP at 113. The court makes no attempt to create and record a bindng agreement, but simply fashions equitable relief.

Illustratively, in *Buck Mountain*, the court below ordered parties were obligated to sign and record a binding covenant entitled "Road Maintenance Agreement Between Buck Mountain Owners Association

and Prestwich-Buckley." *Buck Mountain*, 174 Wn. App. 702 at 727-28. The *Buck Mountain* Court properly held that to be an error of law and that provision of the order to be stricken on remand. *Id.* at 728.

The transcript of the hearings below and the letters from the court make abundantly clear that no such contract was created. While the court found the proposed road maintenance agreement useful as a reference, the order as issued is neither a contract nor an order directing the parties to enter into a contract. The order below was fashioned as an equitable declaration of the duties of the parties to the easement and a mandatory injunction, commanding the performance of positive acts and duties of the parties in dealing with the easement.

Respondents argue that the conditions and affirmative obligations set forth in the court's order are warranted and fair under the circumstances. This Court may disagree with how the court below applied its authority and find that the relief ordered exceeded the equities of the situation. If so then the proper resolution is to remand with instructions to correct the errors, not to vacate the entire order. *Buck Mountain*, 174 Wn. App. 702 at 732.

IV. CONCLUSION

For the foregoing reasons, Respondents urge this Court to DENY Appellant Dunn's request to vacate, and uphold the Order of the Superior

Court below. To the degree that this Court finds error, Respondents request that the underlying order be remanded with instructions to modify.

RESPECTFULLY SUBMITTED this 13th day of June, 2016.

The Kraft Law Group PS

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DAVID K. BOWERS, et. al., Respondent, v. JAMES W. DUNN, et. al., Appellant.	Case No. 48367-0-II (Consolidated with No. 48697-1-II) RESPONDENTS' DECLARATION OF SERVICE OF RESPONSE BRIEF

DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. Amended Respondents' Brief

to be filed in duplicate with the Court of Appeals Division II and served on June 10, 2016, on the following parties and in the manner indicated below:

Douglas N. Kiger
Blado Kiger Bolan, P.S.
4717 S. 19th Street, Ste. 109
Tacoma, WA 98405

[X] by 1st Class Mail, postage prepaid

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 13th day of June, 2016 at Bonney Lake, Washington.

William F. Wright, WSBA# 31063